STATE OF MICHIGAN

COURT OF APPEALS

LESLIE LYNN DEWITT,

Plaintiff-Appellee,

v

BRIAN ANTHONY SIMPSON,

Defendant-Appellant.

UNPUBLISHED
September 14, 2006

No. 268392
Clare Circuit Court
LC No. 03-900537-DS

Before: Sawyer, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

In this custody dispute, defendant appeals by delayed leave granted an order denying his petition for custody and an order awarding plaintiff child support. We affirm in part, reverse in part and remand.

Plaintiff and defendant have two minor children. Prior to the circumstances involved herein, the parties informally agreed to alternate the children on a weekly basis and, thus, no custody order was previously entered. Upon discovering evidence of sexual abuse involving his daughter, defendant petitioned for custody of the parties' children. The court conducted a hearing on the petition and concluded that, because the identity of the perpetrator had not been identified, defendant failed to establish either proper cause or a change of circumstances. The court adopted the parties' existing agreement for week-on, week-off custody as part of an order of the court. Incident to this determination, the court ordered defendant to pay child support.

Defendant first argues that the court erred in dismissing his petition for custody. We agree. In custody disputes, we review a trial court's findings of fact according to the great weight of the evidence standard. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003). The findings " 'should be affirmed unless the evidence clearly preponderates in the opposite direction.' " *Id.* (citation omitted). We review the court's discretionary rulings for an abuse of discretion and its legal conclusions for clear legal error. *Id.* at 507-508.

"The Child Custody Act of 1970, MCL 722.21 *et seq.*, governs child custody disputes between parents, agencies or third parties." *Booth v Booth*, 194 Mich App 284, 292; 486 NW2d 116 (1992). MCL 722.27 provides as follows:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act . . . , for the best interests of the child the court may do 1 or more of the following:
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> * * *
>
> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age . . . . The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. . . . [MCL 722.27(1)(c).]

Generally, a custody award may be modified where the petitioner establishes proper cause or a change in circumstances. *Vodvarka, supra* at 508-509. However, as discussed below, it is critical that the present case does not actually involve *modification* of a custody award because the custody order at issue was the first custody order entered as to the parties' children.

Parties may agree to establish custodial arrangements independent of judicial action. *Harvey v Harvey*, 470 Mich 186, 187-188 n 2; 680 NW2d 835 (2004). But a petition to "modify" custody in these circumstances requires that "the statutory 'best interests' factors control" because such an agreement "cannot relieve the court of its statutory responsibility to ensure that its adjudication of custody disputes is in a child's best interests." *Harvey, supra* at 187-188 n 2. Put simply, an informal custody arrangement such as the parties had before entry of the custody order at issue is not legally binding and does not constitute an existing custody order.

Under the plain language of MCL 722.27(1)(c), a trial court is required to determine whether "proper cause" or a "change of circumstances" has been established, as a threshold to modifying or amending an existing order or judgment of custody. However, MCL 722.27 further requires that an established custodial environment not be modified, absent clear and convincing evidence, by amending an existing order or by the issuance of a new one. MCL 722.27(1)(c); see also *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005) ("Clear and unambiguous statutory language is given its plain meaning, and is enforced as written."). This distinction indicates that the requirement of establishing a change of circumstances or proper cause applies only to the modification of existing custody orders, and not the execution of original orders. See *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712; 664 NW2d 193 (2003) (invoking the maxim, *expressio unius est exclusio alterius*, that the expression of one thing is the exclusion of others). As we observed in *Thompson v Thompson*, 261 Mich App 353, 361-362; 683 NW2d 250 (2004), which involved a similar context of a stipulated temporary custody order:

> The first sentence of MCL 722.27(1)(c) only refers to when a party is attempting to "modify or amend," while the second sentence mandates that the trial court not "modify or amend its previous judgments or orders *or issue a new order* so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." In light of the clear intention of the Legislature, the first sentence of the

> [sic] MCL 722.27(1)(c) does not apply [to] the trial court's initial or "new" custody order in this matter. The trial court's award of custody was not a modification or amendment; it was a new order that is only subject to the limitation provided in the second sentence of MCL 722.27(1)(c). As such, the requirement to show proper cause or change of circumstances does not apply to the trial court's initial award of custody in the present case. [Citations omitted and emphasis in original.]

Accordingly, under MCL 772.27, where custody modification is sought in the absence of an original custody order, the trial court need only evaluate whether an established custodial environment exists, and whether clear and convincing evidence supports its modification if so, or whether a preponderance of the evidence supports an award of custody to the petitioner if not. MCL 722.27(1)(c). In the absence of an existing order of custody, the court is statutorily obligated to evaluate the best interests of the child. *Harvey, supra* at 187-188 n 2.

In this dispute, no custody order was entered prior to defendant's petition to modify custody. Upon determining that defendant failed to establish a change of circumstances or proper cause, the court ordered that custody of the children alternate weekly between the parties, ostensibly reflecting their existing agreement. But because no prior order had been entered, the trial court was

> not required to determine whether defendant demonstrated proper cause or change in circumstances because the proceeding in question was not held to amend or modify a custody order. The trial court's custody award resulting from trial was the original custody award and not a modification or amendment of an existing custody award. [*Thompson, supra* at 358.]

In making a custody determination, a court is required to evaluate the best interests of the child under statutorily enumerated factors. *Harvey, supra* at 187; MCL 722.23. The court failed to engage in a best interests analysis, finding defendant's failure to establish proper cause or change of circumstances dispositive. Because the court's custody order was effectively an original custody award, it erred in failing to consider the best interests of the child in awarding custody. *Harvey, supra* at 188 n 2 (observing that a trial court has a "statutory responsibility to ensure that its adjudication of custody disputes is in a child's best interests"). We thus conclude the trial court erred in dismissing defendant's petition for custody. Therefore, we conclude that the custody order at issue must be reversed and this case remanded for further proceedings.[1]

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[1] Subsequent to our grant of leave to appeal, defendant petitioned for a custody or parenting time modification because the parties' elder child is about to begin school and the existing custody arrangement will prove unworkable. Plaintiff likewise moved to modify custody. The court ordered that defendant's motion be scheduled for trial. The record before us does not disclose whether subsequent action has been taken. We note that much of our opinion could be rendered moot by further proceedings below. Our opinion shall not be construed to negate or require reconsideration of any orders entered during the pendency of this appeal, except to the extent such orders are inconsistent with it. We direct the trial court upon remand to consider what

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Defendant next argues that the trial court erred in entering its child support award. We conclude that defendant is not an aggrieved party as to this issue and therefore cannot raise this issue on appeal. Prior to the court's entry of the current support order, defendant was obligated to pay $200 per month for both children (and $141 per month for one child) under an existing order. The order defendant challenges on appeal requires him to pay only $117.50 per month in support. Nevertheless, defendant requests that we reverse this order and restore the prior support order. However, because defendant was not injured by the challenged change in his support obligation but rather was benefited by it, he is not an aggrieved party as to this issue and thus cannot challenge it on appeal. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291-292; 715 NW2d 846 (2006); *Rymal v Baergen*, 262 Mich App 274, 318; 686 NW2d 241 (2004). We therefore decline to address this issue.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

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continued pertinence our disposition has for these proceedings, and to direct that any further proceedings be consistent with this opinion, to the extent applicable.